Supreme Court, U.S.
FILED
DEC 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-647

In the Supreme Court of the United States

OCTOBER TERM, 1986

ANTHONY LEONARD CUSENZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Cases:	Page
Diggs v. *United States*, 740 F.2d 239	4, 6
Dorszynski v. *United States*, 418 U.S. 424	6
Gaertner v. *United States*, 763 F.2d 787, cert. denied, No. 85-5384 (Dec. 2, 1985)	3, 4
United States v. *Addonizio*, 442 U.S. 178	4
United States v. *Ames*, 743 F.2d 46, cert. denied, 469 U.S. 1165	6
United States v. *Campbell*, 711 F.2d 159	6
United States v. *DeMier*, 671 F.2d 1200	4
United States v. *Grayson*, 438 U.S. 41	6
United States v. *Kajevic*, 711 F.2d 767, cert. denied, 464 U.S. 1047	3
United States v. *Mendoza*, 581 F.2d 89	4
United States v. *Stollings*, 516 F.2d 1287	4
United States v. *Taylor*, 768 F.2d 114	5
Statutes:	
Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 215(b), 98 Stat. 2015	5
Pub. L. No. 99-217, § 4, 99 Stat. 1728	5
18 U.S.C. 1952(a)(3)	2
21 U.S.C. 842(a)(1)	2
21 U.S.C. 843(b)	2
21 U.S.C. 846	2
Fed. R. Crim. P.:	
Rule 35(b)	1, 2, 3, 4, 5, 6
Rule 35 advisory committee note (1985 Amendment)	4
Miscellaneous:	
3 C. Wright, *Federal Practice and Procedure: Criminal 2d* (2d ed. 1982)	6

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Petitioner contends that the court of appeals erred in dismissing an appeal from the denial of a motion to reduce sentence under Fed. R. Crim. P. 35(b).

1. On May 20, 1983, petitioner was charged in a 15-count indictment returned in the United States District Court for the Southern District of Illinois. The indictment charged petitioner, along with co-defendants Christopher Goodson and James Strader, with various offenses arising from their participation in a marijuana conspiracy. On August 1, 1983, peti-

tioner pleaded guilty to the charges of conspiring to possess more than 1000 pounds of marijuana with intent to distribute it, in violation of 21 U.S.C. 841 (a)(1) and 846 (Count 1); traveling in interstate commerce to promote an illegal activity, in violation of 18 U.S.C. 1952(a)(3) (Count 5); and using the telephone to facilitate a narcotics transaction, in violation of 21 U.S.C. 843(b) (Count 12). On September 30, 1983, he was sentenced to a total of 12 years' imprisonment on those charges. Pet. App. 2.[1]

On October 11, 1983, petitioner noted an appeal from his guilty plea conviction. On January 4, 1984, while his appeal was pending, petitioner moved under Fed. R. Crim. P. 35(b) for a reduction in his sentence. The district court held the motion in abeyance pending petitioner's appeal. On December 5, 1984, the court of appeals affirmed petitioner's conviction and sentence (749 F.2d 473), and on January 2, 1985, the district court received the mandate affirming its judgment. Pet. App. 2-3.

After receiving the mandate, the district court held a hearing on the Rule 35(b) motion. Petitioner contended that his sentence should be reduced because of the disparity between his sentence and the sentences imposed on his co-defendants, and because of the court's state of mind at the time of sentencing. He also argued that his family was suffering a hardship as a result of his incarceration. The government opposed the motion. On June 24, 1985, 173 days after receiving the mandate, the district court denied the motion on its merits. Petitioner subsequently noted

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[1] Goodson and Strader each pleaded guilty to the same charges. Goodson was sentenced to seven years' imprisonment, and Strader was sentenced to three years' imprisonment.

an appeal from the order denying his Rule 35(b) motion. Pet. App. 3-4.[2]

The court of appeals, relying on its decisions in *Gaertner* v. *United States*, 763 F.2d 787, 790-795 (7th Cir.), cert. denied, No. 85-5384 (Dec. 2, 1985), and *United States* v. *Kajevic*, 711 F.2d 767 (7th Cir. 1983), cert. denied, 464 U.S. 1047 (1984), vacated the district court's order and remanded the case with instructions to dismiss the Rule 35(b) motion for want of jurisdiction. The court of appeals ruled that under the version of Rule 35(b) that was in effect at the time of the district court's order, the district court had jurisdiction over the Rule 35 motion only for a period of 120 days after it received the mandate. Pet. App. 6-8.

2. Although petitioner acknowledges that Rule 35 has been amended since the district court's order was entered and that the new rule does not apply to his case, he contends (Pet. 7-12) that this Court should resolve the conflict among the circuits regarding the interpretation of the prior version of the rule.

Before the 1985 amendment, which became effective on August 1, 1985, Rule 35(b) provided that a court could reduce a sentence within 120 days after imposition of the sentence or within 120 days after affirmance of the judgment by the court of appeals. On its face, the former version of Rule 35(b) strictly limited the time within which a sentence could be reduced to "120 days after receipt by the court of a mandate issued upon affirmance of the judgment."

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[2] Petitioner's notice of appeal was not timely filed, but the court of appeals did not dismiss the appeal on that ground, because the district court had granted petitioner's motion to extend the time for filing the notice of appeal due to excusable neglect (Pet. App. 5-6).

In *United States* v. *Addonizio*, 442 U.S. 178, 189 (1979), this Court stated that that time period was "jurisdictional and may not be extended."

Despite the literal language of former Rule 35(b), most courts of appeals had allowed district judges a reasonable period after the 120 days to rule on a timely filed motion. See *Diggs* v. *United States*, 740 F.2d 239 (3d Cir. 1984); *United States* v. *DeMier*, 671 F.2d 1200 (8th Cir. 1982); *United States* v. *Mendoza*, 581 F.2d 89 (5th Cir. 1978); *United States* v. *Stollings*, 516 F.2d 1287 (4th Cir. 1975). The Seventh Circuit, however, had adhered to the literal language of the rule, concluding that its interpretation was more faithful to the purpose of the rule and to this Court's decision in *Addonizio*. See *Gaertner* v. *United States*, 763 F.2d at 790-797.

Because of the 1985 amendment to Rule 35, the conflict among the circuits as to the interpretation of the prior version of the rule is of no continuing importance. The 1985 amendment added the provision that "[t]he court shall determine the motion within a reasonable time." The Advisory Committee note on the 1985 amendment explains that the change was made to conform the language of the rule "to the nonliteral interpretation which most courts have already placed upon the rule namely, that it suffices that the defendant's motion was made within the 120 days and that the court determines the motion within a reasonable time thereafter." Fed. R. Crim. P. 35 Advisory Committee note (1985 amendment). Thus, the language of the new rule prospectively resolves the question raised by petitioner in this case and makes it unnecessary for this Court to resolve the conflict among the circuits regarding the proper construction of the prior rule.

Moreover, the 1985 revision of Rule 35(b) is only an interim measure. In its April 29, 1985, order amending Rule 35(b), this Court provided that "[t]he amendment to Rule 35(b) shall be effective until November 1, 1986, when Section 215(b) of the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, approved October 12, 1984, 98 Stat. 2015, goes into effect." A subsequent amendment, Pub. L. No. 99-217, § 4, 99 Stat. 1728, postponed the effective date of Section 215(b) until November 1, 1987. When Section 215(b) of the Comprehensive Crime Control Act becomes effective, it will eliminate Rule 35(b) altogether. Therefore, even if the interpretation of the former version of Rule 35(b) had an impact on the current rule, the issue would not warrant this Court's attention, because it would have no effect in any event after November 1987.

Aside from the insignificance of the issue presented in this case, it is clear that petitioner was not prejudiced by the court of appeals' ruling. Even if the court below had addressed the merits of petitioner's claim, it is virtually certain that the order denying petitioner's motion to reduce his sentence would have been affirmed. Petitioner did not seek to correct an illegal sentence, but merely sought discretionary relief.[3] It is well established that a trial court has vast discretion in imposing a sentence within statutory

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[3] While petitioner asserts (Pet. 6) that his sentence was unreasonable compared to the sentences of his co-defendants and was "the result of a biased and emotional state of mind" on the part of the sentencing court, he makes no claim that the sentence was illegal. Neither of petitioner's claims entitles a defendant to reduction of his sentence. See *United States* v. *Taylor*, 768 F.2d 114, 121 (6th Cir. 1985) (subjective intent of the sentencing court insufficient to require a reduction of sentence).

limits. *United States* v. *Grayson*, 438 U.S. 41 (1978). "[O]nce it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end." *Dorszynski* v. *United States*, 418 U.S. 424, 431 (1974). Consequently, appellate review of a legal sentence almost invariably results in affirmance, particularly when the appellate court is reviewing the sentencing court's exercise of its discretion under Rule 35(b). See 3 C. Wright, *Federal Practice and Procedure: Criminal 2d* § 588, at 415-416 (2d ed. 1982). As the court noted in *Diggs* v. *United States*, 740 F.2d 239, 249 (3d Cir. 1984), "[t]he concept of 'error' has little meaning when applied to motions for relief under rule 35(b). Such motions are addressed entirely to the discretion of the district judge; the judge can deny such motions for virtually any reason or for no reason at all." See also *United States* v. *Ames*, 743 F.2d 46, 48 (1st Cir. 1984), cert. denied, 469 U.S. 1165 (1985); *United States* v. *Campbell*, 711 F.2d 159, 160 (11th Cir. 1983). Accordingly, even if the court of appeals had addressed the merits of petitioner's claim, the opportunity for appellate review would not have resulted in a change in his sentence. That is especially true where, as in this case, petitioner challenged his sentence on direct appeal and the court of appeals rejected his challenge on the merits at that time. See *United States* v. *Cusenza*, 749 F.2d 473, 477-480 (7th Cir. 1984).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1986

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